

2008

# State of Utah v. Michael William Kissell : Brief of Appellee

Utah Court of Appeals

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Case No. 20081065-CA

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IN THE  
UTAH COURT OF APPEALS

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Michael Willam Kissell,  
Petitioner/ Appellant,

vs.

State of Utah,  
Respondent/ Appellee.

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Brief of Appellee

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Appeal from dismissal of a petition for post-conviction relief, in the  
Seventh Judicial District Court of Utah, Grand County, the Honorable  
Lyle R. Anderson presiding.

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Oral Argument Not Requested

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STATEMENT OF JURISDICTION

Defendant appeals from the trial court's dismissal of his petition for post-conviction relief. This Court has jurisdiction under Utah Code Annotated § 78A-4-103(2)(e) (Supp 2009).

STATEMENT OF THE ISSUE

Did the post-conviction court err when it held that Kissell's post-conviction petition was both untimely and procedurally barred?

*Standard of Review.* The "underlying issue" in this case "is one of statutory interpretation, which we review for correctness, affording no deference to [the] lower court's legal determinations." *State v. Yazzie*, 2009 UT 14, ¶ 6, 203 P.3d 984.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Annotated § 78-35a-106 (Supp. 2006) and Utah Code Annotated § 78-35a-107 (Supp. 2006) are determinative of this appeal and are attached as addenda to this brief.

## STATEMENT OF THE CASE

On August 27, 2004, Kissell was charged with one count of forcible sexual abuse of a child, thirty-four counts of dealing in harmful material to a child, and one count of contributing to the delinquency of a minor. R. 69-87. Kissell subsequently pleaded guilty to five counts of dealing harmful material to a child; in exchange, the remaining charges were dropped. R. 93-98. On April 5, 2005, Kissell was sentenced to five terms of 0-5 years in prison, and the trial court ordered the terms to run consecutively. R. 125-26.

Kissell did not file a motion to withdraw his guilty plea, nor did he appeal from his sentence. R. 6. Instead, Kissell's first challenge came on July 14, 2006, when Kissell filed a petition for relief under the Post-Conviction Remedies Act (PCRA). R. 5-12. In his supporting memorandum, Kissell claimed that the trial court had violated his constitutional rights when it ordered the sentences to run consecutively. R. 13-28.

The State moved to dismiss the petition for two reasons. R. 60-67. First, the State argued that the petition was barred by the statute of limitations; and second,

the State claimed that the petition was procedurally barred because Kissell could have raised these claims on direct appeal. R. 60-67. In his response, Kissell implicitly acknowledged that the petition was untimely, but nevertheless asked the court to excuse his late filing under the interests of justice exception to the PCRA's statute of limitations. R. 170-75. With respect to the State's procedural bar argument, Kissell argued that the court should review his claims due to unusual circumstances and the potential for an "obvious injustice." R. 175-78.

The post-conviction court ruled that the petition was both time-barred and procedurally barred, and it then rejected Kissell's claim that any exception to those limitations applied. R. 189-91. The post-conviction court accordingly dismissed his petition. R. 189-91. Kissell appeals that dismissal.

### SUMMARY OF ARGUMENT

On appeal, Kissell does not address the grounds for the post-conviction court's dismissal of his petition. Rather, he only addresses his underlying merits claim regarding the trial court's alleged errors at sentencing. But the court did not address the merits of Kissell's claims in its dismissal decision, instead resting solely on its conclusion that Kissell's petition was both untimely and procedurally barred. Insofar as Kissell has not challenged either of those rulings on appeal, the dismissal must be affirmed.



## ARGUMENT

### I.

#### KISSELL HAS NOT CHALLENGED THE POST-CONVICTION COURT'S BASIS FOR DISMISSING HIS PETITION

Kissell claims that the trial court violated his constitutional rights when it ordered him to serve consecutive sentences. Aplt. Br. 11-28. This claim should be rejected, however, because it fails to challenge the actual basis for the post-conviction court's decision to dismiss his petition.

Kissell's petition was brought under the Post-Conviction Remedies Act (PCRA). *See generally* Utah Code Ann. § 78B-9-101 to -405 (Supp. 2009). Under the PCRA, a petitioner is allowed to challenge a conviction or sentence after exhausting all other legal remedies. Utah Code Ann. § 78B-9-102 (Supp. 2009). A "petition for post-conviction relief 'is a collateral attack of a conviction and/or sentence and is not a substitute for direct appellate review.'" *State v. Myers*, 2004 UT 31, ¶ 11, 94 P.3d 211 (citation omitted). As such, a petitioner does not have an unlimited right to pursue post-conviction claims. Instead, petitions filed under the PCRA are subject to a number of statutorily-prescribed limitations.

In this case, the trial court held that two particular PCRA limitations barred Kissell's claim.

First, the trial court held that Kissell's claim was untimely under the PCRA's statute of limitations. R. 189-91. Under the statute of limitations in effect at the time

of this petition, Kissell was “only” entitled to relief under the PCRA “if the petition [was] filed within one year after the cause of action has accrued.” Utah Code Ann. § 78-35a-107(1) (Supp. 2006). In cases such as this one, where the petitioner did not file a direct appeal, the cause of action accrued on “the last day for filing an appeal.” *Id.* § 78-35a-107(2)(a).

Kissell was sentenced on April 5, 2005. R. 125-26. Thus, the last day for filing an appeal was May 5, 2005. Utah R. App. P. 4(a). He therefore had until May 5, 2006, to file his post-conviction petition. Utah Code Ann. § 78-35a-107(2)(a) (Supp. 2006). Kissell did not file his petition until July 14, 2006, however, so the trial court correctly held that this petition was barred by the statute of limitations. R. 189-91.

Second, the trial court also held that Kissell’s petition was procedurally barred. R. 189-91. Under the statute in effect at the time of this petition, a petitioner was “not eligible for relief . . . upon any ground that: . . . (c) could have been but was not raised at trial or on appeal.” Utah Code Ann. § 78-35a-106(1) (Supp. 2006). This restriction exists “because a petition for post-conviction relief ‘is a collateral attack of a conviction and/or sentence and is not a substitute for direct appellate review,’” and it “‘applies to all claims, including constitutional questions.’” *Myers*, 2004 UT 31, ¶ 11 (citation omitted).

In this case, Kissell could have challenged the legality of his sentence by filing a direct appeal. As he repeatedly acknowledged below, however, he did not appeal

his sentence. R. 6, 10, 165, 172. The trial court therefore correctly held that the petition was procedurally barred. R. 189-91.

In his brief to this Court, Kissell does not acknowledge either ground for dismissal, let alone demonstrate that the trial court incorrectly applied these statutory restrictions in this case. Aplt. Br. 11-29. With respect to the statute of limitations, for example, Kissell does not claim that his petition should have been deemed timely through use of a tolling mechanism, nor does he renew his claim that the petition's untimeliness should have been excused under the interest of justice exception. With respect to the procedural bar, Kissell likewise fails to renew his claim that the good cause or unusual circumstances exceptions applied to this case, nor does he ever argue that the procedural bar was inapplicable because he could not have raised these claims below.

Rather than addressing the grounds by which his petition was dismissed, Kissell instead simply argues that his sentence was constitutionally invalid. Aplt. Br. 11-29. As set forth in the PCRA, however, the PCRA is "the sole remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies." Utah Code Ann. § 78B-9-102 (Supp. 2009). And as set forth in the trial court's unchallenged ruling, Kissell's petition was invalid under the PCRA because it was both untimely and procedurally barred.

Under Rule 24(a)(9), Utah Rules of Appellate Procedure, an appellant's brief must "contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on."

As Utah courts have frequently reiterated, "a reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." *State v. Gomez*, 2002 UT 120, ¶ 20, 63 P.3d 72 (quoting *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988) (in turn quoting *Williamson v. Opsahl*, 416 N.E.2d 783, 784 (Ill. App. Ct. 1981))). Thus, when the appellant fails to present any relevant authority, the reviewing court will "decline to find it for him." *State v. Pritchett*, 2003 UT 24, ¶ 12, 69 P.3d 1278 (rejecting prosecutorial misconduct challenge). Similarly, "[w]hen a party fails to offer any meaningful analysis, [the court will] decline to reach the merits." *State v. Garner*, 2002 UT App 234, ¶ 12, 52 P.3d 467. An appellant must, in addition to citing cases, "explain why . . . the cases cited compel this court to reverse the district court. . . ." *Id.*

Where, as here, an appellant fails to attack the basis of the judgment below, his argument is inadequately briefed and the judgment should be affirmed on that basis. *Cf. State v. Sorenson*, 2004 UT App 381U, at \*1 (affirming where Sorenson failed to challenge two of three bases for trial court ruling: "Sorenson does not

challenge these determinations on appeal and, accordingly, we find no reason to reverse the trial court's denial of Sorenson's motion to suppress"); accord *San Antonio Press, Inc. v. Custom Bilt Machinery*, 852 S.W.12d 64, 65 (Tex. Ct. App. 1993) ("When a separate and independent ground that supports a judgment is not challenged on appeal, the appellate court must affirm"); *James v. Phoenix Gen. Hosp., Inc.*, 744 P.2d 689, 694 (Ariz. 1986) (affirming judgment below on an uncontested issue); *Shraeder v. Eli Lily & Co.*, 639 N.E.2d 258, 264 (Ind. 1994) (affirming judgment below "[b]ecause appellants have not successfully challenged one of the independent grounds supporting summary judgment").

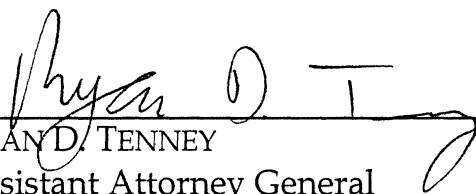
In short, Kissell was required to comply with the PCRA's requirements in order to obtain relief. The trial court ruled that Kissell had not done so, and Kissell has not challenged that ruling on appeal. As such, his appeal should be rejected.

### CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's dismissal of this petition.

Respectfully submitted September 9, 2009.

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## CERTIFICATE OF SERVICE

I certify that on September 9, 2009, two copies of the foregoing brief were

☒ mailed ☐ hand-delivered to:

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A digital copy of the brief was also included: ☒ Yes ☐ No

Melissa Freyer

## Addenda



**§ 78-35a-106 (Supp. 2006) Preclusion of relief--Exception**

(1) A person is not eligible for relief under this chapter upon any ground that:

- (a) may still be raised on direct appeal or by a post-trial motion;
- (b) was raised or addressed at trial or on appeal;
- (c) could have been but was not raised at trial or on appeal;
- (d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or
- (e) is barred by the limitation period established in Section 78-35a-107.

(2) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

**§ 78-35a-107 (Supp. 2006) Statute of limitations for postconviction relief**

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed; or

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based.

(3) If the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations.

(4) Sections 77-19-8, 78-12-35, and 78-12-40 do not extend the limitations period established in this section.